



DELAWARE

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SAME-SEX HARASSMENT

Intragroup discrimination claims remain an uphill battle

by Lauren E.M. Russell

State and federal antidiscrimination statutes permit employees to bring claims alleging discrimination within a protected group. For example, a male employee may file a lawsuit alleging that he was harassed on the basis of his sex by another man. However, these claims are subject to a heightened burden: There's an assumption that individuals within a protected class don't discriminate against each other. That heightened burden was recently affirmed by the U.S. District Court for the District of Delaware.

Birds of a feather flock together

Marc Smith filed suit against his former employer, Perdue Farms, alleging he had been harassed by male coworkers on the basis of his sex. More specifically, he claimed that based on the nature of the harassment to which he was subjected, he suspected that his former coworkers are homosexual and he was being harassed because they found him

attractive. The conduct at issue included lewd actions, such as a coworker placing his hand on Smith's hip and making "humping motions" and commenting "I know you like it." He also alleged that his supervisor made a crude comment about male genitalia.

Smith reported the incidents to Perdue's HR department, which conducted an investigation. HR confirmed that crude banter was common but couldn't verify the specific incidents that Smith reported. After he complained about further misconduct by his coworkers, Perdue conducted harassment training.

Subsequently, Smith was fired for job abandonment. He then filed a lawsuit in which he claimed that he had been subjected to sexual harassment and terminated in retaliation for reporting it. He admitted that he quit showing up for work.

Smith falls down on the job

Following the exchange of evidence by the parties, Perdue asked the court to dismiss the case without a trial, contending that Smith couldn't present any proof sufficient to sustain his claims. The court agreed with Perdue and dismissed the case.

With regard to Smith's conclusion that he had been harassed because of his sex, the court found his allegations that the conduct was motivated by his gender to be speculative at best. He was able to produce no evidence other than his suspicions to support his claim that his coworkers are homosexual. Further, he had no evidence that the harassment actually occurred *because of* his sex. He had reached that conclusion on his own, unaided by any comments from the harassers or other evidence.

Importantly, the court noted that even if Smith had been able to meet his burden in a case of opposite-sex harassment, the burden was higher for a claim of same-sex harassment. His allegation of sexual conduct, without actual evidence that it was based on sexual desire, was insufficient to support his claim. *Smith v. Perdue Farms, Inc.*

Bottom line

Employers frequently forget that employees within a protected class may discriminate against one another. Such conduct is frequently dismissed as typical of interactions within the group (e.g., boys will be boys). However, you have an affirmative obligation to investigate allegations of harassment or discrimination within a protected class.

You can take heart that the standard for such harassment is higher because it's generally assumed that individuals of the same age, race, or sex don't harbor biases against others in the same group. Just don't rely on that heightened standard to avoid litigation!

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